



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XB522]

Taking of Threatened or Endangered Marine Mammals Incidental to Commercial Fishing Operations; Proposed Issuance of Permit

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments.

SUMMARY: The National Marine Fisheries Service (NMFS) is proposing to issue a permit to authorize the incidental, but not intentional, take of specific Endangered Species Act (ESA)-listed marine mammal species or stocks under the Marine Mammal Protection Act (MMPA), in the California (CA) thresher shark/swordfish drift gillnet fishery and the corresponding high seas component of the fishery as defined on the MMPA List of Fisheries as the Pacific highly migratory species drift gillnet fishery.

DATES: Comments on this action and supporting documents must be received by *[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]*.

ADDRESSES: You may submit comments on the proposed permit and the preliminary determination supporting the permit, identified by NOAA-NMFS-2021-0105, through the Federal e-Rulemaking Portal:

1. Go to <https://www.regulations.gov> and enter NOAA-NMFS-2021-0105 in the Search box.
2. Click the “Comment” icon, and complete the required fields.
3. Enter or attach your comments.

Instructions: NMFS may not consider comments if they are sent by any other method, to any other address or individual, or received after the end of the comment period. Due to delays in processing mail related to COVID-19 and health and safety concerns, no mail, courier, or hand deliveries will be accepted. All comments received are a part of the public record and will generally be posted for public viewing on www.regulations.gov without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter “N/A” in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, or Adobe PDF file formats only.

The preliminary determination supporting the permit is available on the Internet at <https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>. Other supporting information is available on the Internet including: recovery plans for the ESA-listed marine mammal species, <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>; 2021 MMPA List of Fisheries (LOF), <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>; the most recent Marine Mammal Stock Assessment Reports (SAR) by region, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>, and stock, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>; and Take Reduction Teams and Plans, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>.

FOR FURTHER INFORMATION CONTACT: Tina Fahy, NMFS West Coast Region, (562) 980-4023, *Christina.Fahy@noaa.gov*; or Jaclyn Taylor, NMFS Office of Protected Resources, (301) 427-8402, *Jaclyn.Taylor@noaa.gov*.

SUPPLEMENTARY INFORMATION: The MMPA requires NMFS to authorize the incidental take of ESA-listed marine mammals in commercial fisheries provided it can make the following determinations: (1) the incidental mortality and serious injury (M/SI) from commercial fisheries will have a negligible impact on the affected species or stocks; (2) a recovery plan for all affected species or stocks of threatened or endangered marine mammals has been developed or is being developed; and (3) where required under MMPA section 118, a take reduction plan has been developed or is being developed, a monitoring program is implemented, and vessels participating in the fishery are registered. We have made a preliminary determination that the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery meets these three requirements and propose to issue a permit to the fishery to authorize the incidental take of ESA-listed marine mammal species or stocks (CA/OR/WA stock of humpback whale and CA/OR/WA stock of sperm whale) under the MMPA for a period of three years. We solicit public comments on the proposed issuance of the permit and the underlying preliminary determination.

Background

The MMPA List of Fisheries (LOF) classifies each commercial fishery as a Category I, II, or III fishery based on the level of mortality and injury of marine mammals occurring incidental to each fishery as defined in 50 CFR 229.2. Category I and II fisheries must register with NMFS and are subsequently authorized to incidentally take marine mammals during commercial fishing operations. However, that authorization is limited to those marine mammals that are not listed as threatened or endangered under the ESA. Section 101(a)(5)(E) of the MMPA, 16 U.S.C. 1371, states that NMFS, as

delegated by the Secretary of Commerce, for a period of up to three years shall allow the incidental, but not intentional, taking of marine mammal stocks designated as depleted because of their listing as an endangered species or threatened species under the ESA, 16 U.S.C. 1531 *et seq.*, by persons using vessels of the United States and those vessels which have valid fishing permits issued by the Secretary in accordance with section 204(b) of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1824(b), while engaging in commercial fishing operations, if NMFS makes certain determinations. NMFS must determine, after notice and opportunity for public comment, that: (1) incidental M/SI from commercial fisheries will have a negligible impact on the affected species or stock; (2) a recovery plan has been developed or is being developed for such species or stock under the ESA; and (3) where required under section 118 of the MMPA, a monitoring program has been established, vessels engaged in such fisheries are registered in accordance with section 118 of the MMPA, and a take reduction plan has been developed or is being developed for such species or stock.

The LOF includes a list of marine mammal species or stocks incidentally killed or injured in each commercial fishery. We evaluated ESA-listed stocks or species included on the final 2021 MMPA LOF as killed or seriously injured following NMFS' Procedural Directive 02-238 "Process for Distinguishing Serious from Non-Serious Injury of Marine Mammals." Based on this evaluation, we propose to issue a permit under MMPA section 101(a)(5)(E) to vessels registered in the Category II CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery, as classified on the final 2021 MMPA LOF, to incidentally kill or seriously injure the CA/OR/WA stock of humpback whale and CA/OR/WA stock of sperm whale.

NMFS will regularly evaluate other commercial fisheries for purposes of making a negligible impact determination (NID) and issuing section 101(a)(5)(E) authorizations with the annual LOF as new information becomes available. More information about the

CA thresher shark/swordfish drift gillnet and Pacific highly migratory species drift gillnet fishery is available in the 2021 MMPA LOF (86 FR 3028; January 14, 2021) and on the Internet at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/list-fisheries-summary-tables>.

We reviewed the best available scientific information to determine if the fishery met the three requirements of MMPA section 101(a)(5)(E) for issuing a permit. This information is included in the 2021 MMPA LOF (86 FR 3028; January 14, 2021), the SARs for these species (available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>), recovery plans for these species (available at: <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>), and other relevant information, as detailed further in the document describing the preliminary determination supporting the permit (available at: <https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>).

NMFS is in the process of revising humpback whale stock structure under the MMPA in light of the 14 Distinct Population Segments (DPSs) established under the ESA (81 FR 62259, September 8, 2016), based on the recently finalized “Procedural Directive 02-204-03: Reviewing and Designating Stocks and Issuing Stock Assessment Reports under the Marine Mammal Protection Act” (NMFS 2019). The humpback whale DPSs that occur in waters under the jurisdiction of the United States do not align with the existing MMPA stocks. Some of the listed DPSs partially coincide with the currently defined stocks. Because we cannot manage one portion of an MMPA stock as ESA-listed and another portion of a stock as not ESA-listed, until such time as the MMPA stock designations are revised in light of the ESA-listed DPSs, NMFS continues to use the existing MMPA stock structure for MMPA management purposes (*e.g.*, selection of a recovery factor, stock status) and treats such stocks as ESA-listed if a component of that

stock is listed under the Act and overlaps with the analyzed commercial fishery.

Therefore, for the purpose of this MMPA 101(a)(5)(E) authorization, NMFS considered the CA/OR/WA stock of humpback whale to be ESA-listed as it overlaps with the two ESA-listed DPSs (Mexico, and Central America).

Basis for Determining Negligible Impact

Prior to issuing a MMPA 101(a)(5)(E) permit to take ESA-listed marine mammals incidental to commercial fishing, NMFS must determine if the M/SI incidental to commercial fisheries will have a negligible impact on the affected marine mammal species or stocks. NMFS satisfies this requirement by making a NID. Although the MMPA does not define “negligible impact,” NMFS has issued regulations providing a qualitative definition of “negligible impact,” defined in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Criteria for Determining Negligible Impact

NMFS relies on a quantitative approach for determining negligible impact detailed in NMFS Procedural Directive 02-204-02 (directive), “Criteria for Determining Negligible Impact under MMPA section 101(a)(5)(E),” which became effective on June 17, 2020 (NMFS 2020). The procedural directive is available online at:

<https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>. The directive describes NMFS’ process for determining whether incidental M/SI from commercial fisheries will have a negligible impact on ESA-listed marine mammal species/stocks (the first requirement necessary for issuing a MMPA section 101(a)(5)(E) permit as noted above).

The directive first describes the derivation of two Negligible Impact Thresholds (NIT), which represent levels of removal from a marine mammal species or stock. The

first, Total Negligible Impact Threshold (NIT_t), represents the total amount of human-caused M/SI that NMFS considers negligible for a given stock. The second, lower threshold, Single NIT (NIT_s) represents the level of M/SI from a single commercial fishery that NMFS considers negligible for a stock. NIT_s was developed in recognition that some stocks may experience non-negligible levels of total human-caused M/SI but one or more individual fisheries may contribute a very small portion of that M/SI, and the effect of an individual fishery may be considered negligible.

The directive describes a detailed process for using these NIT values to conduct a NID analysis for each fishery classified as a Category I or II fishery on the MMPA LOF. The NID process uses a two-tiered analysis. The Tier 1 analysis first compares the total human-caused M/SI for a particular stock to NIT_t . If NIT_t is not exceeded, then all commercial fisheries that kill or seriously injure the stock are determined to have a negligible impact on the particular stock. If NIT_t is exceeded, then the Tier 2 analysis compares each individual fishery's M/SI for a particular stock to NIT_s . If NIT_s is not exceeded, then the commercial fishery is determined to have a negligible impact on that particular stock. For transboundary, migratory stocks, because of the uncertainty regarding the M/SI that occurs outside of U.S. waters, we assume that total M/SI exceeds NIT_t and proceed directly to the Tier 2 NIT_s analysis. If a commercial fishery has a negligible impact across all ESA-listed stocks, then the first of three findings necessary for issuing a MMPA 101(a)(5)(E) permit to the commercial fishery has been met (*i.e.*, a negligible impact determination). If a commercial fishery has a non-negligible impact on any ESA-listed stock, then NMFS cannot issue a MMPA 101(a)(5)(E) permit for the fishery to incidentally take ESA-listed marine mammals.

These NID criteria rely on the best available scientific information, including estimates of a stock's minimum population size and human-caused M/SI levels, as published in the most recent SARs and other supporting documents, as appropriate. Using

these inputs, the quantitative negligible impact thresholds allow for straightforward calculations that lead to clear negligible or non-negligible impact determinations for each commercial fishery analyzed. In rare cases, robust data may be unavailable for a straightforward calculation, and the directive provides instructions for completing alternative calculations or assessments where appropriate.

Negligible Impact Determination

NMFS evaluated the impact of the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery following the directive, and, based on the best available scientific information, made a draft NID.

The CA/OR/WA stock of humpback whale is a transboundary stock. As noted above, because of the uncertainty regarding M/SI that occurs outside of U.S. waters for transboundary stocks, we assumed that total M/SI exceeds NIT_t and proceeded directly to the Tier 2 NIT_s analysis. The CA/OR/WA stock of humpback whale has documented incidental M/SI with this fishery in the most recent (2021) draft CA/OR/WA humpback whale SAR (Carretta *et al.* 2021). The estimated annual M/SI of humpback whales (CA/OR/WA stock) in the CA drift gillnet fishery is 0.1, based on observer data. Since this M/SI (0.1) is less than NIT_s (2.48), NMFS determined that the CA drift gillnet fishery/Pacific highly migratory species drift gillnet fishery has a negligible impact on the CA/OR/WA stock of humpback whales (see accompanying MMPA 101(a)(5)(E) determination document linked above for NIT calculations).

The draft 2021 SAR includes mean annual total commercial fishery-related M/SI (≥ 25.2) for the CA/OR/WA stock of humpback whale. This comprises M/SI from all commercial fisheries, including the CA thresher shark/swordfish drift gillnet fishery, as well as fishery-related M/SI for the stock not assigned to a specific commercial fishery. The SAR also includes unattributed fishery-related M/SI (11.15) for the stock, which is not assigned to a specific commercial fishery. This unattributed fishery-related M/SI

could be from any number of commercial, recreational or tribal fisheries, including the CA thresher shark/swordfish drift gillnet fishery. Because data are not currently available to assign the unattributed fishery-related M/SI to a specific commercial fishery, we did not include unattributed mortality in the calculations for the NID Tier 2 analysis. In addition, because the CA/OR/WA humpback whale stock is considered to be a transboundary stock, NMFS assumed NIT_t is exceeded and conducted the more conservative Tier 2 analysis with the lower NIT_s criterion. NMFS is actively monitoring the CA thresher shark/swordfish drift gillnet fishery through a fishery observer program. Further, most of the information on large whale entanglements on the West Coast is reported to and documented by the West Coast Large Whale Entanglement Response Program. If additional fishery-related M/SI of the CA/OR/WA stock of humpback whale is documented through the observer program or West Coast Large Whale Entanglement Response Program that indicates additional M/SI of the CA/OR/WA stock of humpback whale in the CA thresher shark/swordfish drift gillnet fishery, then NMFS will re-evaluate the NID and the permit.

The CA/OR/WA stock of sperm whale has documented incidental M/SI with this fishery in the most recent (2019) final CA/OR/WA sperm whale SAR (Carretta et al. 2020). The total annual average human-caused M/SI for the CA/OR/WA stock of sperm whales from 2013-2017 is 0.64, including 0.4 per year for the CA thresher shark/swordfish drift gillnet fishery and 0.24 per year for the sablefish hook and line fishery (Carretta et al. 2020). There was no other human-related M/SI of the CA/OR/WA stock of sperm whale reported during this time period. Since M/SI (0.64) is less than NIT_t (2.54), the CA drift gillnet fishery/Pacific highly migratory species drift gillnet fishery is considered to have a negligible impact on the CA/OR/WA stock of sperm whales.

The NID analysis is presented in an accompanying MMPA 101(a)(5)(E) determination document that provides summaries of the information used to evaluate

each ESA-listed stock documented on the 2021 MMPA LOF as killed or injured incidental to the fishery (available at: <https://www.fisheries.noaa.gov/action/mmpa-list-fisheries-2021>). The draft MMPA 101(a)(5)(E) determination document is available at: <https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>. Based on the criteria outlined in the directive, the most recent SAR, and the best available scientific information, NMFS has determined that the M/SI incidental to the Category II CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery will have a negligible impact on the associated ESA-listed marine mammal stocks (CA/OR/WA stock of humpback whale and CA/OR WA stock of sperm whale). Accordingly, this MMPA 101(a)(5)(E) requirement is satisfied for the commercial fishery (see draft MMPA 101(a)(5)(E) determination document is available at: <https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>).

Recovery Plan

Recovery plans for humpback whales and sperm whales have been completed (see <https://www.fisheries.noaa.gov/national/endangered-species-conservation/recovery-species-under-endangered-species-act>). Accordingly, the requirement to have recovery plans in place or being developed is satisfied.

Take Reduction Plan

Subject to available funding, MMPA section 118 requires the development and implementation of a Take Reduction Plan (TRP) for each strategic stock that interacts with a Category I or II fishery. The stocks considered for this permit are designated as a strategic stock under the MMPA because the stocks, or a component of the stocks, are listed as threatened or endangered under the ESA (MMPA section 3(19)(C)).

The CA thresher shark/swordfish drift gillnet fishery, for the affected marine mammal species or stocks, has a TRP in place. Accordingly, the requirement under MMPA section 118 to have TRPs in place or in development is satisfied (see preliminary

determination supporting the permit available on the Internet at

<https://www.regulations.gov/docket/NOAA-NMFS-2021-0105>).

Monitoring Program

Under MMPA section 118(d), NMFS is to establish a program for monitoring incidental M/SI of marine mammals from commercial fishing operations. The CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery has been observed by NMFS since 1990. Accordingly, the requirement under MMPA section 118 to have a monitoring program in place is satisfied.

Vessel Registration

MMPA section 118(c) requires that vessels participating in Category I and II fisheries register to obtain an authorization to take marine mammals incidental to fishing activities. NMFS has integrated the MMPA registration process, implemented through the Marine Mammal Authorization Program, with existing state and Federal fishery license, registration, or permit systems for Category I and II fisheries on the LOF. Therefore, the requirement for vessel registration is satisfied.

Conclusions for Proposed Permit

Based on the above evaluation for the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery as it relates to the three requirements of MMPA section 101(a)(5)(E), we propose to issue a MMPA 101(a)(5)(E) permit to the commercial fishery to authorize the incidental take of ESA-listed species or stocks during commercial fishing operations. If, during the 3-year authorization, there is a significant change in the information or conditions used to support any of these determinations, NMFS will re-evaluate whether to amend or modify the authorization, after notice and opportunity for public comment. NMFS solicits public comments on the proposed permit and the preliminary determination supporting the permit.

ESA Section 7 and National Environmental Policy Act Requirements

ESA section 7(a)(2) requires federal agencies to ensure that actions they authorize, fund, or carry out do not jeopardize the existence of any species listed under the ESA, or destroy or adversely modify designated critical habitat of any ESA-listed species. The effects of the CA thresher shark/swordfish drift gillnet/Pacific highly migratory species drift gillnet fishery on ESA-listed marine mammals for which a permit is proposed here, were analyzed in the appropriate ESA section 7 Biological Opinion on the commercial fishery, and incidental take was exempted for those ESA-listed marine mammals for the fishery.

Under section 7 of the ESA, Biological Opinions quantify the effects of the proposed action on ESA-listed species and their critical habitat and, where appropriate, authorize anticipated future take of ESA-listed species as specified in the incidental take statement. Under MMPA section 101(a)(5)(E), NMFS analyzes previously documented M/SI incidental to commercial fisheries through the negligible impact determination process, and when the necessary findings can be made, issues a MMPA section 101(a)(5)(E) permit that allows for an unspecified amount of incidental taking of specific ESA-listed marine mammal stocks while engaging in commercial fishing operations. Thus, the applicable standards and resulting analyses under the MMPA and ESA differ, and as such, may not always align.

The National Environmental Policy Act (NEPA) requires Federal agencies to evaluate the impacts of alternatives for their actions on the human environment. Because the proposed permit would not modify any fishery operation and the effects of the fishery operations have been evaluated in accordance with NEPA, no additional NEPA analysis beyond that conducted for the associated Fishery Management Plan is required for the permit. Issuing the proposed permit would have no additional impact on the human environment or effects on threatened or endangered species beyond those analyzed in these documents.

References

- Carretta, J.W., K.A. Forney, E.M. Olson, D.W. Weller, A.R. Lang, J. Baker, M.M. Muto, B. Hanson, A.J. Orr, H. Huber, M.S. Lowry, J. Barlow, J.E. Moore, D. Lynch, and R.L. Brownell. 2021. Draft U.S. Pacific Marine Mammal Stock Assessments: 2021. NOAA- TM-NMFS-SWFSC-XXX.
- Carretta, J.W., K.A. Forney, E.M. Olson, D.W. Weller, A.R. Lang, J. Baker, M.M. Muto, B. Hanson, A.J. Orr, H. Huber, M.S. Lowry, J. Barlow, J.E. Moore, D. Lynch, L. Carswell, and R.L. Brownell. 2020. U.S. Pacific Marine Mammal Stock Assessments: 2019. NOAA- TM-NMFS-SWFSC-629.
- National Marine Fisheries Service (NMFS). 2020. National Marine Fisheries Service Procedure 02-204-02: Criteria for Determining Negligible Impact under MMPA Section 101(a)(5)(E). 20 p. Available online: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>.
- National Marine Fisheries Service (NMFS). 2019. National Marine Fisheries Service Procedure 02-204-03: Reviewing and designating stocks and issuing Stock Assessment Reports under the Marine Mammal Protection Act. 9 p. Available online: <https://www.fisheries.noaa.gov/national/laws-and-policies/protected-resources-policy-directives>
- National Marine Fisheries Service (NMFS). 2016. National Marine Fisheries Service Procedure 02-204-01: Guidelines for preparing stock assessment reports pursuant to the 1994 amendments to the Marine Mammal Protection Act. 23 p. Available online: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/guidelines-assessing-marine-mammal-stocks>.
- National Marine Fisheries Service (NMFS). 2014. National Marine Fisheries Service Procedure 02-238-01: Process for Distinguishing Serious from Non-Serious

Injury of Marine Mammals. 42 p. Available online:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations>

Dated: December 13, 2021.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

[FR Doc. 2021-27278 Filed: 12/15/2021 8:45 am; Publication Date: 12/16/2021]